Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

THOMAS L. MICKLER,

Petitioner,

v.

THE NIMISHILLEN & TUSCARAWAS RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Are railroads previously classified as exempt now subject to jurisdiction under the Federal Employers' Liability Act?

2) Has Congress' stated declaration of purpose in 45 U.S.C. Sec. 421 and 434 to promote safety and uniformity in all areas of railroad operations and to reduce railroad related accidents, coupled with 1988 amendments specifically deleting the words "common carrier" and "interstate" wherever they appear in the Safety Appliance Act, covered the subject of railroad safety so as to pre-empt state actions and thus to confer jurisdiction under the Federal Employers' Liability Act for all railroad employees injured while on duty?

3) Is a private railroad licensed as a common carrier and servicing its parent company both inside plant grounds and on adjacent interstate exchange railroad tracks and carrying manufactured goods destined for out-of-state destinations now subject to FELA due to Congressional Amendments to the Federal Safety Appliance Act specifically and extensively deleting the words "common carrier" and "interstate" wherever these words appear?

4) Is it a denial of Petitioner's constitutional rights to due process and equal protection of the laws and an unjust result not intended by Congress to deny him FELA coverage previously afforded, when the portion of the railroad on which he worked was purchased by an intrastate company, yet

his job remained exactly the same and the locomotive on which he was working continued to be inspected by federal authorities pursuant to federal safety requirements?

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Trial Court opinion is unreported.

The Sixth Circuit Opinion of December 23, 1993 is cited as **Thomas L. Mickler v. The Nimishillen & Tuscarawas Railway Company**, 13 F.3d 184 (CA-6 1993).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

On December 23, 1993, the Sixth Circuit Court of Appeals entered judgment affirming the United States District Court's decision granting summary judgment to The Nimishillen & Tuscarawas Railway Company on the ground of lack of jurisdiction under the Federal Employers' Liability Act ("FELA").

The jurisdiction of this Court to review the opinion and judgment of the Sixth Circuit Court of Appeals is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Article I, Section 8, Clause 3:

The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

STATUTES AND LEGISLATIVE HISTORY INVOLVED

45 U.S.C. Secs. 1 - 65, Secs. 421 - 444

4 U.S.C.C. & A.N.
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(Set forth in Appendix)

STATEMENT OF THE CASE

Thomas L. Mickler originally worked for the Mahoning Valley Railway Company, an interstate common carrier, as an employee-operator, and continued in his same job when a portion of the track was sold to Republic Engineered Steel Company and became known as The Nimishillen and Tuscarawas Railway Company ("N & T") in November 1989. Petitioner was never informed that there were any changes in his status, and the federal inspectors regularly performed required inspections of the locomotive pursuant to federal safety requirements.

Petitioner suffered an on-duty injury on June 28, 1990, and he negotiated his FELA claim himself for

some months, during which time his physician was informed by letter from the railroad that the state workers' compensation law did not apply, and Petitioner was given advances of $20,000.00 on his claim, which he understood that he had to repay to the railroad upon settlement of his FELA claim. When Petitioner obtained an attorney, the railroad retaliated by cutting off advances, but the railroad continued to negotiate with Petitioner's attorney under FELA and offers and demands were made. When negotiations finally failed, the Petitioner filed his claim in U.S. District Court under FELA, and the railroad answered admitting FELA jurisdiction and that it was a common carrier railroad in interstate commerce. After initial pretrial, the railroad

amended its answer and filed for summary judgment, claiming it never came under FELA jurisdiction since its inception. A sworn affidavit of the railroad's Vice President was attached to the Motion, which Motion for Summary Judgment was granted by the Court based on the affidavit. The Court relied on the 1986 case of **Kieronski v. Wyandotte Terminal Rd. Co.**, 806 F.2d 107 (6th Cir. 1986) in finding the N & T to be an intrastate railroad not subject to FELA jurisdiction because Petitioner worked essentially for one company and on interstate exchange tracks adjacent to the company premises, even though the manufactured goods were destined eventually for out-of-state locations.

The Trial Court's decision granting summary judgment to the N & T Railroad was appealed to the Sixth Circuit Court of Appeals which affirmed the lower Court's decision on the basis of lack of jurisdiction under FELA, relying on the **Kieronski** case and refusing to read the June 22, 1988 Congressional amendments to 45 USC Sec. 1-43 in pari materia with the FELA, and failing to apply the pre-emption standards set forth in **Easterwood v. CSX**, 507 US ____ , 113 S.Ct. ____, 123 L.Ed.2d 387 (1993).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner, an employee of the Nimishillen & Tuscarawas Railway Company, a railroad licensed as an interstate carrier, originally sought damages for personal injury under the Federal Employers' Liability Act, and Defendant's original Answer acknowledged proper jurisdiction under the Act in the United States District Court for the Northern District of Ohio, Eastern Division.

ARGUMENT

Article 1, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "[t]o regulate commerce with foreign Nations and among the several States, and the Indian Tribes." It is well settled that pursuant to this provision Congress may regulate wholly intrastate activity that has an effect on interstate commerce. Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed., 726 (1942).

Prior to June 22, 1988, the Federal Safety Appliance Acts were applicable to all common carriers by railroad in the United States engaged in interstate commerce, and to all such carriers in the District of Columbia and the territories, and placed a duty upon them to install and maintain safety equipment and keep it in working order. Failure of the carrier to comply resulting in injury to an employee established a right of action under the Federal Employers' Liability Act. O'Donnell v. Elgin, J. & E.R. Co., 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187, 16 A.L.R.2d 646 (1950), rehearing denied 338 U.S. 945, 70 S.Ct. 427, 94 L.Ed. 583; Carter v. Atlanta & St. Andrews Bay R. Co., 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949).

On June 22, 1988, the words "common carrier" and "interstate" were deleted wherever they appear in the entire Act, making the Act apply to all railroads.

The FELA (45 U.S.C. Sec. 51-60) and the Federal Safety Appliance Act (45 U.S.C. Sec. 1-16) are in pari materia, and cannot be regarded as separate from or independent of each other. **Urie v. Thompson**, 337 US 163, 93 L.Ed. 1282, 69 S.Ct. 1018, 11 ALR.2d 252 (1949); **San Antonio & A.P.R. Co. v. Wagner**, 241 US 476, 60 L.Ed. 1110, 36 S.Ct. 626 (1916); **Moore v. Chesapeake & O.R. Co.**, 291 US 205, 78 L.Ed. 755, 54 S.Ct. 402 (1934).

See also **McCarthy v. Penn R. Co.**, 156 F.2d 877, 879 (CA-7, 1946).

The object of the Safety Appliance Act is remedial and

humanitarian in its purpose, to protect lives and limbs of railroad employees, and is not to be construed as narrowly as to defeat the obvious intent of the legislature. United States v. Illinois C.R. Co., 177 F 801 (CA6-1910).

Congress had the reasonable expectation when it made the 1988 amendments that the Courts will honor the public policy to provide FELA coverage to the extent of Congress's ability to regulate and upon the Court's precedent of interpreting FELA in pari materia with the Federal Safety Appliance Act.

The FELA can no longer be constitutionally applied only to interstate common carriers because to do so constitutes an unreasonable classification under these recent enactments.

Thus, the 1986 **Kieronski** case, cited above, relied on by the trial court and the Sixth Circuit Court of Appeals herein, which was decided before the 1988 amendments is no longer good law, and summary judgment was absolutely improper and based on an erroneous standard. **Kieronski v. Wyandotte**, 806 F.2d 107 (1986) demanded that an intrastate railroad be exempted from FELA and required that wholly-owned railroads owned by a steel company and operating for the benefit of one company within a state on its own and adjacent interstate exchange tracks be excluded from FELA coverage -- by a judicially crafted and contrived exception to FELA.

The Congressional Acts of June 22, 1988, substituting "railroad" for "common carrier" and deleting "in

interstate or foreign traffic" following "any car or vehicle" wherever appearing effectively overruled the 1986 standard on which the lower Court's decision was based, and corrected the need for contrived distinctions. See also Easterwood v. CSX, 507 US ___ , 113 S.Ct. __ , 123 L.Ed.2d 387 (1993), and CSX Transp. Inc. v. Public Utilities Commission of Ohio, 901 F.2d 497 (CA-6, 1990) in regard to other matters of railroad safety also recently being pre-empted by federal law.

The only appropriate and reasonable constitutional interpretation in light of the amendments is to include intrastate activities.

45 U.S.C. Sec. 434 reads that "laws, rules, regulations, orders and standards relating to railroad safety

shall be nationally uniform to the extent practicable."

Liberal construction of FELA is necessary in order to carry out legislative purpose and intent. **Jamison v. Encarnacion**, 281 US 635, 74 L.Ed. 1082, 50 S.Ct. 440 (1930).

Congressional policy has extended the federal safety regulations in order to attain a national uniform system with regard to railroad safety and consequently FELA coverage is extended by necessary judicial interpretation to all railroad employees in circumstances similar to that of Petitioner's. The U.S. Supreme Court is making improper and incorrect law if the within decision is permitted to stand.

"If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." Easterwood v. CSX, 507 US ___ , 113 S.Ct. ___ , 123 L.Ed.2d 387 (1993) at p. 396.

The new June 22, 1988 Congressional amendments clearly intend to "cover the subject" of locomotive safety, as defined at p. 397 of Easterwood, cited above.

There is not only clear Congressional intent to regulate here, but an intolerable conflict between the previously appropriate judicial exclusions culminating in the Kieronski case in 1986, and the now clearly

inappropriate judicial exclusions manifested in the incorrect 1993 **Mickler** decision in the Sixth Circuit which absolutely ignored the intent of the 1988 specific Congressional amendments and the U.S. Supreme Court decisions permitting the regulation of intrastate commerce with respect to railroads.

As has been recognized in **Parden v. Terminal R. of Alabama Docks Dept.**, 377 US 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 reh. den. 377 US 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964), cited affirmatively in **Hilton v. S C Pub. R. Com.**, 116 L.Ed.2d 560 (1991), Congress intended to act as fully as it could in respect to safety. And so it has! And therefore the judiciary must follow its long established and recognized practice of following

Congressional intent.

The Sixth Circuit, in ruling as it has herein is denying Easterwood's premise and creating confusion and will create an effect opposite of that intended by Easterwood, and opposite of the stated Congressional intent in the June 22, 1988 amendments to 45 U.S.C. Sections 1-43 which clearly intended sweeping changes, for there would be no need to substitute "railroad" for "common carrier" and to delete the word "interstate" if Congress intended no change, because the SAA and BIA already applied to interstate common carriers.

Moreover, to pretend that a railroad employee's job which has never changed, is suddenly no longer covered under FELA because an Ohio corporation licensed as a common carrier purchased a

section of the line, defies the safety purposes for which the FELA was enacted and the stated intent of the 1988 amendments.

Defendant railroad was dismissed herein because of the exception that it is not a common carrier, a judicial classification that heretofore has been held constitutional in early cases, and through the 1986 **Kieronski** case relied on herein by the Sixth Circuit, but when applied now leads to gross injustice. **Second Employers' Liability cases**, 223 US 1, 56 L.Ed. 327, 32 S.Ct. 169 (1912); **Brooks v. Southern P. Co.**, 148 F 986, aff'd 207 US 463, 52 L.Ed. 297, 28 S.Ct. 141 (1906).

This issue is ripe, and a decision herein clarifying the status of railroad employees injured due to

defective locomotives under the 1988 Congressional Acts is necessary for uniform application of the laws and to avoid unnecessary litigation.

The U.S. Supreme Court determined in **Parden v. Terminal Railway of Alabama Docks Dept.**, 377 US 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 reh den. 377 US 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964), and **Hilton v. S C Pub. R. Com.**, 116 L. Ed.2d 560 (1991) that Congressional intent should be broadened to include implications intended by the legislature, and acknowledged that Congress remains able to make alterations, acknowledging the importance of stare decisis but expressing a willingness to depart for a compelling reason.

Such compelling reason exists here and now and is an expressed change in Congressional intent which has resulted in a compelling need for judicial re-interpretation of its standards in regard to traditional judicial exemptions carved out of FELA cases.

The case discussion itself and the strong dissent in the recent Ohio Supreme Court case of **In re: Miamisburg Train Derailment**, 68 OS.3d 255 (2-9-94), 258, 268 further demonstrates the confusion in the Courts' attempts to apply the **Easterwood** rationale, **Easterwood v. CSX Transp. Corp. v. Easterwood**, 507 US ___, 113 S.Ct. ___ , 123 L.Ed.2d 387 (1993), and confusion in determining congressional intent. There is a compelling need for guidance herein

from the U.S. Supreme Court in a situation that involves thousands of railroad employees but is distinguishable from **Easterwood**, which does not reach the issue of injury to railroad employees.

The original intent of the FELA was to apply as widely as possible. The original intent should now be reapplied and the other cases shed like the skin of a snake.

If the case is allowed to stand, Mickler and thousands of other railroaders injured by unsafe appliances and locomotives which are subject to federal inspection, will be without a remedy under the very laws which were passed for such employees' protection.

The U.S. Supreme Court has found it necessary on many occasions to re-interpret judicial decisions based on

changing congressional intent and the needs of justice, including in the **Parden** case, cited above, found broad language and purpose in the FELA sufficient to encompass a small terminal railroad, and found no intent to exclude particular classes of railroad workers from the Act, which would effectively create a right without a remedy, stating at p. 238, "We are unwilling to conclude that Congress intended so pointless and frustrating a result." and found that where Congress gave no indication that it desired to be hindered in the exercise of its constitutional power, there is nothing in the Constitution to obstruct its will (p. 243).

The will of Congress to protect railroad employees working on equipment subject to Federal inspections and standards should not be thwarted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Order of the Sixth Circuit.

Respectfully submitted,

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